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PRECONCEPTION INJURIES: VIABLE EXTENSION OF PRENATAL INJURY LAW OR INCONCEIVABLE TORT?

INTRODUCTION

Ideally, judicially created law both regulates and reflects social mores. To maintain their integrity in the presence of constantly changing societal contexts, courts must strike a delicate balance between creativity and continuity.[1] Judicial treatment of the prenatal injury tort clearly exemplifies this nirvana of creative continuity.[2] Initially, the common law was both resolute and consistent in its denial of prenatal injury actions.[3] Viewed as part of his mother, the unborn child was denied legal recognition and, *a fortiori*, was neither owed a duty of care nor capable of stating a cause of action for injuries sustained prior to live birth. The mid-1940's marked the beginning of an abrupt judicial about-face which would bestow legal personality first on the viable, and eventually on the merely conceived, fetus.[4] This commendable extension of negligent tort law's compen-

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1. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

2. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55 (4th ed. 1971) [hereinafter cited as PROSSER].

3. *See, e.g.*, Alliare v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Lipps v. Milwaukee Electric R.R. & L. Co., 164 Wis. 272, 159 N.W. 916 (1916); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921). *Contra*, Korman v. Hagen, 165 Minn. 320, 206 N.W. 650 (1925).

4. The following jurisdictions permit actions for prenatal injuries if the plaintiff is injured while viable and is subsequently born alive: Panogopoulous v. Martin, 295 F.Supp. 220 (D.W. Va. 1969) (applying state law); Wendt v. Lillo, 182 F.Supp. 56 (D. Iowa 1960) (applying state law); Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Callahan v. Slavsky, 153 Colo. 291, 385 P.2d 674 (1963); Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 11 A.2d 14 (Super. Ct. 1955); Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Orange v. State Farm Mutual Auto. Ins. Co., 443 S.W.2d 650 (Ky. 1969); Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1959); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Streggal v. Morris, 363 Mo. 1224, 258 S.W.2d 557 (1953); White v. Yup, 458 P.2d 617 (Nev. 1969); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1849); Mollison v. Pomery, 205 Ore. 690, 291 P.2d 225 (1955); Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968); Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960); Shousha v. Matthews Drivurself Serv., Inc., 210 Tenn. 384, 358 S.W.2d 471 (1962); Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1907).

satory protection to unborn children has progressed with unfortunate obliviousness to the qualitatively and quantitatively important claims of those injured *before* conception. This note addresses this relatively unnoticed tort and explores the plausibility of causes of action in negligence for injuries sustained prior to conception.

Preconception or genetic injuries are those injuries which an individual sustains prior to conception as a result of damage to the genetic structure of one or both of his parents or other ancenstor.[5] For example, suppose a child is born deformed and proof exists that this condition was caused years earlier when a doctor negligently exposed the child's mother to unreasonable amounts of radiation thereby altering the parent's genetic structure. The question arises whether the child, as biological recepient of the damaged genes, may maintain a negligence action against the doctor for his earlier negligent conduct. This hypothetical elicits two basic characteristics

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The following states permit actions for prenatal injuries if the plaintiff is conceived when injured and is subsequently born alive: Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973) (wrongful death action); Justus v. Atchison, 126 Cal. Rptr. 150, 53 Cal. App. 3d 556 (1976) (by statute); Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560 (Fla. 1976); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967) (wrongful death action); Womack v. Buckhorn, 384 Mich. 718, 187 N.W.2d 218 (1971); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Super. Ct. 1976), *aff'd*, 46 L.W. 2326 (Dec. 12, 1977); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966); Yandell v. Delgado, 471 S.W.2d 569 (Tex. Civ. App. 1971). Recovery for prenatal injuries was also allowed under the Federal Tort Claims Act, 28 U.S.C. § 1346 (1970), in Sox v. United States, 187 F. Supp. 465 (E.D.S.C. 1960).

The following states do not permit recovery for prenatal injuries: Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962) (applying state law); Hosty v. Moulton Water Co., 39 Mont. 310, 102 P. 568 (1909); Drabbles v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Howell v. Rushing, 261 P.2d 217 (Okla. (1953); Webb v. Snow, 102 Utah 435, 132 P.2d 114 (1942); Bouce v. Danville, 53 Vt. 1 (1880); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

The following states have no reported prenatal injury case: Arizona, Arkansas, Hawaii, Idaho, Indiana, Maine, New Mexico, North Dakota, South Dakota, and Wyoming.

5. Note, *Radiation and Preconception Injuries: Some Interesting Problems In Tort Law*, 28 S.W.L.J. 414, 415 n.7 (1974).

Preconception injuries are the damages suffered by subsequent generations. Although a potential defendant's negligent conduct caused changes or mutations in a parent or ancestor, no harm is suffered by him or her. The harmful effects, therefore, do not really become apparent until subsequent generations. Thus, unlike prenatal injuries where the unborn child is a separate entity when injured in the mother's womb, preconception injuries are suffered before separate existence. *See* Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706, 707 (1977).

of the preconception injury tort; both the defendant's negligence and the plaintiff-child's injuries occur *before* the child's conception.[6] The example also raises several of the problems which are inherent in the preconception injury action. These obstacles include difficulties in proving causation[7] and damages,[8] avoiding the applicable statute of limitations,[9] and showing that the defendant owes a duty of care

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6. This note is also applicable if a potential defendant's negligent conduct occurred before the future plaintiff's conception, but no damage attaches until conception or later. Thus the discussion is appropriate should a preconception tort give rise to either an action for prenatal injuries or wrongful life. *Id.*

7. *See, e.g.*, E. STASON, S. ESTEP & W. PIERCE, ATOMS AND THE LAW 222 (1959) [hereinafter cited as ATOMS]; Note, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 S.W.L.J. 414, 418 (1974); Keyes & Horvath, *Approaches to Liability for Remote Causes: The Low Level Radiation Example*, 56 IOWA L. REV. 531 (1971); "[A]s our knowledge of radiation exposure and genetic damage increases, it may well prove possible to satisfy the causation-in-fact requirement." ATOMS, *supra* at 203.

8. *See generally* Powell, *Effects of Radiation on Man*, 12 VAND. L. REV. 81 (1958).

9. There is little disagreement that when the last of all the elements of a tort necessary for the successful maintenance of an action occurs, the cause of action is said to have accrued. *See, e.g.*, Merrit v. Economy Dept. Store, 125 Ind. App. 560, 128 N.E.2d 279 (1955); Wabash County v. Pearson, 120 Ind. 462, 22 N.E. 134 (1889). In the preconception injury action, the last element to occur will be damage.

The first problem for consideration is, therefore when does the damage occur. If damage occurs at the moment of negligent impact, the statute of limitations will begin to run before the potential plaintiff's conception. The result may often be that these plaintiffs will be deprived of any cause of action not only before the damage was discovered, but before they were conceived. On the other hand if damage is said to occur at birth, Justice Duckworth's theoretical caution in Hornbuckle v. Plantation Piper Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956), becomes realistically applicable.

Following the United States Supreme Court decision in Urie v. Thompson, 337 U.S. 163, 169 (1949), a significant trend in courts' interpretation of limitations statutes has developed. In holding that the plaintiff's cause of action accrued when his injuries become *apparent*, the Supreme Court in *Urie* referred to "the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after *notice* of the invasion of legal rights." *Id.* at 170. One author who has explored the aftermath and effect of *Urie*, has identified:

> [A] significant trend has been developing in cases involving delayed manifestation diseases or injuries caused by wrongful conduct which was not known to the plaintiff at the time of the technical invasion of his legal interests. . . . [A] person must have some notice of his cause of action, an awareness either that he has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to him before the statute can begin to run.

Estep & Van Dyke, *Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases*, 62 MICH. L. REV. 753, 764 (1964) [hereinafter cited as *Radiation Injuries*]. To the extent that this trend has been accurately characterized, the preconception injury may be held to accrue when the genetically damaged child has notice of his injuries. *Id.* at

to the yet unconceived child.[10] Of these, only the existence of duty to the preconceived child has received scant attention by courts and commentators. This note addresses the issue of whether the presence of a duty to unborn generations can and should be judicially recognized.

Three methods may be suggested by which to evaluate the feasibility of extending judicial cognizance to the plaintiff injured prior to his conception. The first approach examines whether preconception injuries are compensable under existing theories of prenatal injury tort law. This necessitates a thorough analysis of the prenatal injury cause of action to determine the tests and theories which courts historically have applied when considering actions for injuries occurring before birth. As existing theories present little hope to the genetically damaged plaintiff, a following section explores the applicability of legal precedents to the unique preconception injury cause of action. The dearth of precedent necessitates a final discussion respecting the logic of existing prenatal injury theories. The vast majority of courts has established points in intrauterine existence, typically viability[11] or conception,[12] at which time

770. This has meant, in at least one jurisdiction, City of Miami v. Brooks, 70 S. 2d 306 (Fla. 1954), that the pre-birth injury cause of action accrues at birth.

A second interesting problem in the preconception injury action is whether the preconceived entity will be considered under a disability. Legal disabilities postpone the running of the statute and include infancy, insanity and imprisonment. If preconception "existence" is not construed to be a disability, the inquiry reverts to the discussion above as to the time at which damage occurs. If a disability is established it will temporarily toll the running of the statute, and remain in most jurisdictions until removed. *Radiation Injuries, supra* at 770.

Commentators have agreed that preconception "existence" should be considered, like infancy, a disability. One author has concluded:

> [I]f recovery were to be allowed to children, deformed as a consequence of the genetic damage suffered by a parent . . . the cause of action might be tolled during his minority, providing no special limitation statute is enacted to accommodate such new principles of liability.

Id. Infancy is widely recognized as a legal disability. Preconception existence, which is logically a greater disability than infancy, should, therefore, also toll the running of the limitation period.

10. The terms "preconception injuries," "pre-birth injuries," "prenatal injuries," and "preconceived child" are difficult to define. For the purpose of clarity, preconception injuries describe the damage which the unborn child suffers before conception. Prenatal injuries will be defined as injuries which the unborn child received at any point from the moment of conception to birth. Pre-birth injuries is used as including the entire spectrum of injuries which may occur before birth; therefore, pre-birth injuries encompass both prenatal and preconception injuries. The unborn "entity" before conception will be referred to as the preconceived or unconceived child.

11. *See* note 4 *supra.*

12. *See* note 4 *supra.*

a duty of care toward the unborn child arises. An attempt is made to expose the illogic and injustice of such "point-picking" theories and to suggest a more rational approach to the pre-birth and preconception injury tort.

The discussion presupposes that proof of causation of a genetically damaged plaintiff's injuries exists and that he is able to avoid the applicable state statute of limitations. Furthermore, it is essential to recognize that the cause of action is brought by the genetically damaged plaintiff *after* birth on his *own* behalf. Thus, the issues narrow to whether this living plaintiff will be able to establish that at the moment of injury before his conception, he was owed a duty of care by the allegedly negligent party. As the following section suggests, the state of the law at present will deny the preconception injury cause of action because, as a matter of law, no duty is owed the unborn child before conception.

HISTORICAL PERSPECTIVE—THEORIES OF PRE-BIRTH INJURIES

As preconception injury cases arise, the willingness of courts to recognize a cause of action may depend on the degree to which the genetically damaged plaintiff is able to fit his claim into the judicial reasoning consistently invoked in pre-birth injury actions. It is, therefore, appropriate to examine past cases in order to determine whether the plaintiff injured before conception can establish the sufficiency of his cause of action under accepted judicial theories of the pre-birth injury tort.

The Initial American View

The most famous and influential prenatal injury case, *Dietrich v. Inhabitants of Northampton*,[13] initiated in 1884 a sixty year period in which courts would consistently dismiss actions for injuries occurring before birth. The *Dietrich* case arose when a woman who was four months pregnant fell on a negligently maintained highway. The woman miscarried and her prematurely born child died within fifteen minutes.[14] Justice Holmes, speaking for the Massachusetts Supreme Court, summarily refused to recognize the death action brought by the administrator of the dead child's estate:

> If we should assume . . . that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being . . . we should then be confronted by the

13. 52 Am. Rep. 242, 138 Mass. 14 (1884).
14. *Id.* at 15.

> question . . . whether an infant dying before it was able to live separated from its mother could be said to [be] . . . a person recognized by the law as capable of having a locus standi in court . . . . Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her . . . .[15]

While Holmes did not clearly indicate the precise reason for denying the cause of action, commentators agree that the dismissal rested on three grounds: lack of precedent, the nonexistence of a person under the applicable death statute, and the absence of any duty owed the unborn child who was merely part of his mother.[16]

The reasoning in *Dietrich*, although clearly directed at the construction of a wrongful death statute, was subsequently accepted as authority for the proposition that the *surviving* child could not maintain a cause of action for prenatal injuries.[17] For sixty years, *Dietrich* was consistently cited as precedent for the common law refusal to cloak the unborn child with the legal personality which would have enabled him to bring his own cause of action after birth.

Subsequent judicial decisions contributed further justifications for denying the prenatal injury cause of action. Numerous courts dismissed these claims due to the difficulty in establishing a causal relationship between the defendant's tortious conduct and the injury to the unborn child.[18] Other courts, equally concerned with the difficult causation issue, advanced their fears of increased litigation and fictitious claims as justification for dismissal and suggested that such actions must await legislative approval.[19] Early commentators

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15. *Id.* at 16, 17. *See, e.g.*, Note, *Recovery for Prenatal Injuries: Michigan Exercises its "Ghosts of the Past,"* 47 N.D. L. REV. 976, 977 (1972).

16. Note, *Recovery for Prenatal Injuries: Right of A Child Against Its Mother*, 10 SUFFOLK L. REV. 582, 584-85 (1976).

17. It would appear to be inappropriate to compare prenatal injury actions to wrongful death actions. *Compare* 15 A.L.R.3d 992 (1967), *with* 40 A.L.R.3d 1222 (1971).

18. *See, e.g.*, Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935). No doubt the state of medical science in this period was such that proof of causation-in-fact would be tenuous; nevertheless, this rationale for a court's dismissal appears to be an unfounded intrusion on an issue typically left to the jury. *See also* Stacy v. Kickerbacker Ice Co., 84 Wis. 614, 54 N.W. 1091 (1893).

19. *See, e.g.*, Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926) (expressing fear of permitting recovery based on conjecture and speculation).

also approved dismissal based on such problems as intrafamilial suits[20] and the transferability of defenses.[21]

Based on these considerations, the initial view of American courts respecting prenatal injuries was clearly against recognizing a cause of action. For purposes of negligence law, the unborn child was conclusively presumed to be part of his mother. Legal personality was held to attach only *after* live birth and, therefore, the unborn child could be owed no duty of care. Thus, by definition, there was no prenatal injury cause of action.

The no-recovery rule initiated by *Dietrich* did not go unnoticed or uncriticized.[22] During the period following *Dietrich*, opposition mounted and led courts to reconsider the merits of the prenatal injury case and to eventually permit actions for injuries sustained by the viable[23] unborn child.

The Viability Theory

The first inroad into the common law no-recovery rule found its analytical roots in the influential dissent of *Alliare v. St. Luke's Hosp.*[24] The majority of the *Alliare* court denied the plaintiff-child's prenatal injury cause of action for lack of duty on the authority of *Dietrich.*[25] The dissent in *Alliare* questioned the majority's reliance on *Dietrich* and stressed that the plaintiff had sustained damage while viable.[26] The dissent agreed that the four month old, nonviable fetus in *Dietrich* was part of his mother and, therefore, was owed no duty of care. It stressed, however, that once viable, an unborn child was no longer part of his mother but was by definition capable of independent existence. Thus, separate existence and *a fortiori* legal personality were held to attach at that point in intrauterine development when the fetus was able to live outside his mother's womb. Once viable, the fetus could independently come within the zone of

20. *See generally* Note, *Recovery for Prenatal Injuries: Right of A Child Against Its Mother*, 10 SUFFOLK L. REV. 582 (1976).

21. The problem in this respect is whether a pregnant woman's contributory negligence will bar her child's suit for prenatal injuries.

22. *See, e.g.*, Winfield, *The Unborn Child*, 4 U.TORONTO L.J. 275 (1942).

23. Viability may be defined as the twenty-fourth week of gestation although some fetuses may be viable before the twentieth week. Elwood & Thompson, *Fetal Viability*, 1 LANCET 862 (1975).

24. 184 Ill. 359, 56 N.E. 638 (1900).

25. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 570, 588 (1965).

26. 184 Ill. 359, 56 N.E. 638, 641-642 (1900).

danger created by a negligent party and, subject to live birth and proof of causation, could recover for his injuries.[27]

The dissenter's reasoning passed unnoticed until fifty years later when the District Court for the District of Columbia permitted a malpractice action in *Bonbrest v. Kotz*[28] for injuries sustained by a fetus during natural childbirth. The *Bonbrest* court reasoned:

> True [the viable fetus] is in the womb, but it is capable now of extrauterine life—and while dependent for its continued development on sustenance derived from its mother, it is not a "part" of the mother in the sense of a constituent element—as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers.[29]

In holding that a child could maintain an action for prenatal injuries if viable when injured and subsequently born alive, *Bonbrest* proved to be of overwhelming precedential importance.[30] Dissatisfied with the harshness of the *Dietrich* rule denying any remedy for the prenatal wrong, subsequent decisions began to permit actions for prenatal injuries to unborn children if viable when damaged. Based on the analysis in *Bonbrest*, recovery in these cases stemmed from recognition that the viable fetus, because separable from his mother, was an independent legal personality and was owed a separate duty of care.

The separability analysis in *Bonbrest*, although extending compensatory protection to the viable fetus, served to assure the dismissal of actions for injuries sustained by nonviable unborn children. With *Bonbrest* as authority, later decisions invoked three grounds for the denial of actions for prenatal injuries to a pre-viable fetus: the lack of the nonviable fetus' separate existence from his mother and, therefore, the lack of a legal personality to which a duty could be owed;[31] the increased difficulty in establishing proof of

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27. *Id.*

28. 65 F. Supp. 138 (D.D.C. 1946).

29. *Id.* at 140.

30. Note, *Recovery for Prenatal Injuries: Michigan Exercises Its "Ghosts of the Past"*, 47 N.D. L. REV. 976, 979 (1972). *See, e.g.*, Rodriguez v. Patti, 415 Ill. 496, 114 N.E.2d 271 (1953); Damasiewicz v. Garsuch, 197 Md. 417, 79 A.2d 550 (1951); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Williams v. Marion Rapid Transit Co., 152 Ohio St. 114, 87 N.E.2d 334 (1949); Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955).

31. *See generally* White, *The Right to Recovery for Prenatal Injuries*, 12 LA. L. REV. 383 (1952).

causation as injuries approached the moment of conception;[32] and the fear of fictitious claims.[33]

These justifications for dismissing actions for injuries to previable unborn children were promptly attacked as illfounded and illogical.[34] The *Bonbrest* viability theory represented a monumental step towards remedying the prenatal wrong and is today followed by a numerical majority of courts;[35] nevertheless by halting compensory protection at viability, it was criticized as presenting, "the potential for working injustice,"[36] and, "seeking to eliminate injustice by being half just."[37] Such criticisms gained judicial acceptance eight years later when the New York Supreme Court Appellate Division[38] examined and rejected the rationale of the viability theory for denying recovery to the nonviable fetus and initiated yet another phase of prenatal tort recovery which granted legal personality to the unborn child from the moment of conception.

The Biological-Separability Theory

In 1953 *Bonbrest's* newly established viability theory was successfully attacked in *Kelly v. Gregory.*[39] Allowing the plaintiff-child's cause of action for injuries sustained while nonviable, the *Kelly* court stated:

> While the point at which the fetus becomes viable has been of usefulness in drawing some legal distinctions, the underlying problem that has usually troubled the judges who have written on the subject of recovery for prenatal injuries, has been in fixing the point of legal separability from the mother . . . . We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided;

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32. *See generally* McBride & Norvall, *The Extension of Tort Liability in the Field of Prenatal Injuries*, 26 INS. COUNSEL J. 148 (1959).

33. *Id.*

34. *See, e.g.*, Muse & Spinella, *Right of Infant to Recover for Prenatal Injury*, 36 VA. L. REV. 611 (1950); Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUT. L. REV. 61 (1950); Note, *Liability for Injuries Negligently Inflicted on Viable Unborn Child*, 63 HARV. L. REV. 173 (1949); Note, *Tort Actions for Injuries to Unborn Infants*, 3 VAND. L. REV. 283 (1950); Note, *The Law of Prenatal Injuries*, 37 U. COLO. L. REV. 271 (1965). *See also* Smith v. Brennan, 31 N.J. 353, 157 A.2d 249 (1960).

35. *See* note 4 *supra.*

36. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 589 (1965).

37. Note, *A New Theory in Prenatal Injuries: The Biological Approach*, 26 FORD. L. REV. 684, 688 (1958)

38. Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

39. *Id.*

> and what we know makes it possible to demonstrate clearly that separability begins at conception.
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> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its develpment is not to destroy its separability; it is rather to describe conditions under which life will not continue.[40]

Utilizing reasoning similiar to *Bonbrest*, the *Kelly* court determined the point before birth at which legal personality attaches on the basis of the unborn child's separability from his mother. However, unlike *Bonbrest*, *Kelly* acknowledged that due to the tremendous progress in medical knowledge, *conception* and not viability marked the beginning of that separability.[41]

Although not discussed in *Kelly* three catalytic developments in the 1940's lend credence to the court's reliance on expanding scientific knowledge.[42] A German measles epidemic in Australia, research on the inheritance of the Rh factor in fetal blood, and the bombing of Hiroshima and Nagasaki each spurred research which disproved earlier scientific positions and established conception as the beginning of the unborn child's separability.[43]

While still a minority view, the modern trend is clearly toward a rejection of *Bonbrest's* viability theory and, pursuant to *Kelly*, toward the allowance of actions for any post-conception injuries.[44] Eight states[45] have adopted the biological-separability theory and have accepted conception as the point at which the unborn child's legal personality begins. These courts have, furthermore, rejected the contention advanced by jurisdictions following *Bonbrest's* viabili-

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40. *Id.* at 697.

41. *See generally* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1962); Note, *A New Theory in Prenatal Injuries: The Biological Approach*, 26 FORD. L. REV. 684 (1958).

42. Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 PA. L. REV. 554 (1962).

43. *Id.*

44. *See* note 4 *supra*.

45. The eight states are Alabama, Florida, Georgia, Illinois, Massachusetts, New Hampshire, Pennsylvania, and Texas.

ty theory, that increased problems in proving the cause of injuries to nonviable fetuses precludes recovery.[46]

Legal commentators, nearly unanimous in support of the biological-separablility theory, have also attacked the viabiltiy theory as irrational and illogical. Several commentators have advanced the intriguing argument that since criminal and property law recognize the unborn child's separate legal existence from the point of conception, courts should also recognize the separate existence of the conceived child for the purpose of redressing torts.[47] Another

46. *See generally* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1962).

Furthermore, any difficulty in establishing a causal relationship between a defendant's tortious conduct and injuries to a nonviable fetus is irrelevant in determining the sufficiency of a cause of action; the problems in proving the cause of prenatal injuries are not substantially more different or difficult than in typical negligence or workmen's compensation cases. Estep & Fergutson, *Legal Liability for Genetic Injuries From Radiation*, 24 LA. L. REV. 1, 29-30 (1963).

47. These analogies to property and criminal law serve useful explanatory functions but falter in two respects. First, criminal, property and tort law are not directed at, nor do they effectuate, the same societal function. The mere assertion that property and criminal law are operative from the moment of conception is not in itself sufficient justification for tort law following suit. Second and more importantly, assuming these other areas of the law do serve some appropriate analogous function to the scope of tort protection, past commentators have consistently failed to recognize the extent to which these other areas of the law have afixed themselves into the unborn child's "existence" before birth. Thus, alhough past commentators have suggested that other areas of the law "recognize" the unborn child from the moment of conception, property, contract and intentional tort law have in fact "recognized" the unborn child *before* conception.

In light of these criticisms, the following will elaborate a few examples of judicial excursions into preconception "existence." The purpose of this analysis is not to conclusively establish that negligent tort law does or should extend its protection via duty to the preconceived "entity." Rather, the ultimate focus is whether the preconception "realm" is of appropriate ethical or moral concern as exemplified by its treatment in other areas of the law. Thus, if duty concepts serve in part as a rough mirroring of the general populus' concensus as to the extent which a party should compensate those injured by his conduct, it may be helpful to establish initially that preconception "existence" has been the legitimate concern of many other facets of the law.

Almost a century ago the New York Court of Appeals in *Piper v. Hoard*, 107 N.Y. 73, 13 N.E. 626 (1887), considered whether a twenty-one year old girl could recover for financial damages as the result of a fraud perpetrated on her mother before her own conception. In permitting the girl's recovery, the *Piper* court held in part:

> It is true, the plaintiff was not born when the fraudulent representations were made. Still they were made by the defendant to the plaintiff's mother . . . and, if they had been true, the plaintiff would have been the owner of this particular property. In this way she is the very person injured by the fraud, and although not individually in the mind of the defen-

plausable argument against retention of the viability theory stresses that as medical knowledge has expended in the past few decades, it has become increasingly apparent that a fetus is most susceptible to

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> dant when he perpetrated that fraud . . . she belongs to the class which defendants had in contemplation . . . . Why should not the plaintiff be entitled to hold the defendant to his representations?

Id. at 629. The *Piper* court was apparently not the least concerned "with some abstract ontological proposition as to the instant a human being becomes a person." *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied*, 379 U.S. 945 (1963). Neither birth, viability nor conception served as appropriate cut-off points before which the denial of a cause of action is compelled. The *Piper* court, therefore, recognized the financial wrong, traced that wrong to the defendant's fraud, and provided the remedy, all without any great concern as to the plaintiff's existence at the time of the tort. Notably, duty analysis is not appropriate in the intentional tort sphere, but the societal concern for the preconceived child has, nevertheless, in part warranted the judicial extension exemplified in *Piper*.

Contract law, specifically in the area of domestic relations, has also refused to halt the effectuation of its societal function at the moment of conception. A common example generally accepted today is that rights secured in an antenuptial marriage settlement to future children will be protected from impairment, 42 AM. JUR. 2d, *Infants* § 2 (1969). Thus, an antenuptial marriage contract anticipating divorce will be held void as against public policy, Posner v. Posner, 233 So. 2d 381 (Fla. 1970). The legitimate judicial concern for the protection of future children serves as the basis for this determination: "The law recognizes an equitable interest in possible future children, who at the creation of the right have no physical existence whatever." 42 AM. JUR. 2d *Infants* § 2 (1969). The plaintiff in some future preconception injury case could, therefore, argue that if courts are legitimately concerned with my being labelled as illegitimate due to a contract entered into before my conception, how is it they express no concern for debilitating preconception injuries leaving me financially and physically handicapped for life.

Two final examples of courts' equitable interest in possible future children may be given in the area of property law. At common law the doctrine of shifting descent governed the case of an heir born after the death of an intestate. The doctrine produced the following results:

> [A]n heir born at any time after the death of the intestate, whether conceived or not at the time of the latter's death would be entitled to share. Thus, if the nearest intestate successor at the death of the intestate was his sister, and the parents (who could not inherit realty at common law) also survived, the sister's intestate share was liable at any time to be divested partially by the birth of other sister's (who would share equally with her as coparceners), or entirely by the birth of a brother (who would take everything under primogeniture and preference for males).

A. GULLIVER, CASES AND MATERIALS ON GRATITUOUS TRANSFERS 100 (1967). Thus, the common law developed a doctrine by which the right of preconceived "entities" to share in intestate distribution was protected.

Another more modern example of the presence of property law in the preconception "realm" is the contingent remainder to unborn children. A hypothetical may assist in describing this example. If one wills land to X for life, remainder to X's children, courts will not permit X to sell his life estate in fee simple. The concern is with the future rights of unconceived or unborn children who may take after X's death. *See generally* Note, *Unborn Parties in Property Litigation*, 48 HARV. L. REV.

environmental influences during the early stages of pregnancy, particularly during the first trimester.[48] By applying the viability theory, courts would, therefore, limit recovery to the atypical fetal injury while rejecting the more substantial and probable claims of those alleging pre-viability injuries. A final objection to retention of the analysis in *Bonbrest* is that viability has not been uniformly defined.[49] Many variable factors such as age, weight and environmental conditions comprise determinations of viability. Problems, therefore, become apparent in a trial wherein a court must

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1001 (1935); Roberts, *Virtual Representation in Action Affecting Future Interests*, 30 ILL. L. REV. 580 (1936); Greese v. Stadiem, 198 N.C. 445, 152 S.E. 398 (1930). The policy basis in these areas of the law, therefore, warrants their presence and concern with the unborn child before conception.

Additional examples of legitimate social concerns over the health of the child before conception are also readily available outside the direct oversight of the judicial process. An entire new scientific field has already evolved in which prospective parents may receive expert consultation on the possibilities of their future children having congenital defects. Furthermore, it is common knowledge that prospective mothers should undergo frequent health checks and take advantage of such procedures as vaccination against German measles before becoming pregnant:

> [Vaccination of these prospective mothers] is not proposed as a protection of the woman herself, against what is usually a scarcely noticable illness; its purpose is purely and simply that of protecting an unborn, unknown individual against a small but identifiable probability that it will be born with a congenital defect.

R. MORISON, QUALITY OF HUMAN LIFE, BIOMEDICAL ETHICS AND THE LAW 333 (New York 1976).

The individual basis for this concern of the unborn child's preconception "existence are varied and numerous. Many, like the World Health Organization, speak of the right of the infant to begin life outside the mother in a healthy state, *Id.* On the opposite end of the spectrum are the utilitarian concerns of those who emphasize the tremendous social costs of maintaining the products of an unfavorable preconception environment, *Id.* Between these two views are those who base their concern for a favorable preconception existence on the fact that the results for both the future child and the mother are "better." *Id.*

Regardless of the underlying motives, the relevant point is the basic societal concern for the preconceived child. It is submitted, therefore, that our society has a distinct and definable interest in the preconceived "entity" as exemplified by the presence and influence of both the law and individual concerns in preconception environment.

48. Wilson, *Experimental Studies on Congenital Malformations*, 10 J. CHRON. DIS. 111, 119 (1959).

49. H. SMITH, ETHICS AND THE NEW MEDICINE 19 (1970) (viability beings from the twenty-eight week of gestation); J. MORRISON, FETAL AND NEONATAL PATHOLOGY 99-100 (1963) (stressing that the length and weight of the fetus are better factors to consider than fetal age); J. WILLIAMS, OBSTETRICS 493 (14th ed. 1971) (viability occurs during the twentieth to twenty-eighth week of gestation); Gruenwold, *Growth of the Human Fetus*, 94 AM. J. OF OBSTET. & GYN. 1112 (1966) (different racial groups reach viability at different times).

determine the moment at which viability commences; even among medical authorities no consensus of agreement exists.[50]

By permitting actions for injuries to both the viable and non-viable fetus, the biological-separability theory has received widespread approval. With legal personality attaching at conception, the conceived child can be owed a duty of care and, subject to live birth and proof of causation, recovery for antecedent injuries. A small minority of states,[51] while agreeing with this result, has nevertheless rejected the internal analysis of the biological-separability theory. The following discussion addresses those few states which maintain that the roots of recovery lie not in scientific determinations of separability, but in the ideal of "justice".

The Right-to-be-Born-Sound Theory

Three states[52] have extended judicial cognizance to the unborn child from the moment of conception, not on separability analysis, but on the child's right to be born with a sound mind and body. The most succinct delineation of this "right-to-be-born-sound" theory was reiterated in the Rhode Island case of *Sylvia v. Gobeille*.[53] In ruling that the plaintiff-child had stated a cause of action for injuries resulting from a physician's negligent failure to prescribe any remedy for her pregnant mother, notwithstanding the physician's knowledge of the mother's exposure to German Measles, the *Sylvia* court stated:

> While we could as sometimes been done elsewhere, justify our rejection of the viability concept on the medical fact that a fetus becomes a living human being from the moment of conception, we do so not on the authority of the biologist but because we are unable logically to conclude that a claim for an injury inflicted prior to viability is any less meritorious than one sustained after . . . . Justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.[54]

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50. Note, *A New Theory in Prenatal Injuries: The Biological Approach*, 26 FORD. L. REV. 684, 688 (1958).

51. Womack v. Buckhorn, 384 Mich. 718, 187 N.W.2d 218 (1971); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966).

52. *See* cases cited in note 51 *supra*.

53. 101 R.I. 76, 220 A.2d 222 (1966).

54. *Id.* at 223-224.

Thus, unlike those courts which accepted the biological-separability theory, the *Sylvia* court did not find a cause of action on the basis of acceptance of scientific advances. The unborn child was owed a duty of care from the moment of conception and could recover at birth for any post-conception injuries not on the authority of the scientist, but because an undefined judicial sense of "justice" had so mandated.

Tort protection has been extended by the biological-separability and right-to-be-born-sound theories to the unborn child *from* the moment of conception. The following section explores an interesting group of cases which have dealt with claims for injuries sustained by the unborn child *at* the moment of conception.

Wrongful Life Actions

Wrongful life cases involve the unusual claim that the plaintiff is entitled to recover damages because the defendent's negligence led proximately to the plaintiff's very existence.[55] Thus, unlike the biological-separability and right-to-be-born-sound theories which "protect" the unborn child from the time of conception, the theory advanced by the wrongful life plaintiff is that tort law's compensatory protection is also present *at* conception.

Typical of these cases is *Zepeda v. Zepeda*,[56] where an illegitimate child sued his father seeking damages "for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his paternal ancestors and for being stigmatized as a bastard."[57] The *Zepeda* court had little trouble in labelling as tortious the conduct of the defendant-father in inducing the illigetimate child's mother into having sexual relations by fraudulent promises of marriage.[58] More important was the court's finding that a tort could be inflicted upon a being simultaneously with its conception:

> The case at bar seems to be the natural result of the present course of the law permitting actions for physical injuries ever closer to the moment of conception. In point of time it goes just a little further. The significance of this course to us is this: if recovery is to be permitted an infant one month after conception, why not if injured one

55. *See generally* Annot. 22 A.L.R.3d 1441 (1968).
56. 41 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied*, 370 U.S. 945 (1963).
57. *Id.* at 851.
58. *Id.* at 852-53.

> week after, one minute after, or *at* the moment of conception? . . . If there is human life, proved by subsequent birth, then that human life has the same rights *at* the time of conception as it has at any time thereafter.[59]

Recognizing the tort at conception to be the logical and just outgrowth of the expansion of prenatal tort law, the *Zepeda* court nevertheless denied the plaintiff-child's action for reasons of public policy.[60] As subsequent wrongful-life cases emerged, these public policy arguments became more well-defined. Included among those arguments against the illegitimate child's action were: (1) the lack of precedent,[61] (2) the impossibility of measuring damages which would necessarily be based on the difference between illegitimate existence and non-existence,[62] (3) the fear of flooding courts with similar claims by the hundreds of thousands of others stigmatized as illegitimates,[63] and (4) the policies against intrafamily suits and abortions.[64]

With such persuasive arguments against recovery, few wrongful life actions have been allowed.[65] Notably, the arguments against recovery have absolutely no bearing or applicability to the moment at which the "injury" arises. Although cases are dismissed because of these public policy arguments, courts, nevertheless, recognize that an action could be maintained within the present state of the law for injuries which are suffered *at* conception.

Prenatal tort law, in the context of these wrongful life actions, now encompasses all stages of prenatal "existence." As previously noted,[66] the history of prenatal injury law may aptly be described as

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59. *Id.*

60. *Id.* at 858-59.

61. Note, *Torts — Illegitimacy — Bastard Has Cause of Action Against State for Negligently Permitting Her Mother's Rape, Causing Plaintiff's Illegitimacy*, 41 N.Y.U. L. REV. 212 (1966).

62. Note, *Unusual Cases of Tort Liability*, 77 HARV. L. REV. 1349 (1964).

63. Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127 (1966).

64. Note, *Illegitimate Child Denied Recovery Against Father For Wrongful Life*, 49 IOWA L. REV. 1005 (1964).

65. *See generally* Brantley, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140 (1976).

This author makes an essential distinction between wrongful birth (suit by parent) and wrongful life (suit by child) actions. The only wrongful life actions thus far permitted are Jorgensen v. Mead Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973), and Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Super. Ct. 1976).

66. *See* note 59 *supra*.

a distinct judicial course permitting actions for injuries sustained closer and closer to the moment of conception. This judicial course of extending protection to unborn children progressed through roughly four stages. Initially, recovery was denied for any prenatal injury, typically on the authority of *Dietrich*.[67] Under the viability theory[68] initiated by the *Bonbrest* court in 1946, legal personality was held to attach when the fetus became capable of independent existence; therefore, once viable, the unborn child was owed a duty of care and was able at birth to state a cause of action. *Kelly* and subsequent cases accepting the biological-separability theory,[69] extended protection to unborn children before viability to the moment of conception by reasoning that legal personality existed at the moment the unborn child is biologically-separable from his mother. Courts adhering to the "right-to-be-born-sound" theory[70] also held that the unborn child was owed a duty of care from the moment of conception, but justified this extension on undefined notions of justice. Rounding out the historical treatment of the pre-birth injury tort are those wrongful life cases[71] which arguably afford the unborn child protection at conception. The central question remains whether this distinct judicial course of extending protection to unborn children must halt at viability or conception, or whether the three basic theories of prenatal injury law contain sufficient internal flexibility to remedy the preconception wrong.

PRECONCEPTION INJURIES—A ROUGH ROAD TO RECOVERY UNDER EXISTING THEORIES

With nearly all states[72] following either the viability, biological-separability or right-to-be-born-sound theories which bestow legal personality on the unborn only after a specific point in pre-birth "existence," the genetically damaged plaintiff will encounter substantial impediments to establishing the sufficiency of his cause of action. Under the viability and biological-separability theories, the plaintiff must show his requisite "separability" at the time of his preconception injury. Should such an action arise in a state adhering to the right-to-be-born-sound theory, the genetically damaged plainfiff will need to argue that this "right" also exists *before* conception. This section analyzes the tenuous arguments to which the plaintiff in-

67. *See* note 13 *supra* and accompanying text.
68. *See* note 24 *supra* and accompanying text.
69. *See* note 39 *supra* and accompanying text.
70. *See* note 52 *supra* and accompanying text.
71. *See* note 55 *supra* and accompanying text.
72. *See* note 4 *supra*.

jured before conception must resort under these historically rooted theories in order to establish the required duty of care.

Preconception Injuries Under the Viability Theory

In all probability the preconception injury action will fail to state a cause of action under the viability theory. The viability approach requires that the potential plaintiff be injured while capable of extrauterine existence.[73] Without this independence the unborn child is held to be without legal personality, and therefore, the potential defendant will have owed him no duty of reasonable conduct. Based on this analysis, the unborn child before conception appears to be manifestly "unviable." Not only is the unborn child incapable of extrauterine existence before conception, but his intrauterine existence as a fertilized ovum has not yet begun.

Nevertheless, the plaintiff injured before conception may still satisfy the prerequisites of duty under the viability theory. Courts adhering to the viability theory do not define "viability" uniformly.[74] Some courts profess to accept as viable the unborn child capable of independent existence *with artificial aid.*[75] Thus, if at the particular moment of injury an unborn child could have lived apart from his mother even by artificial means, he may be considered "viable" and, therefore, owed a duty of care.

In a jurisdiction applying the viable theory as defined above, a child injured before conception has a tenuous, yet extremely provacative argument in favor of the sufficiency of his cause of action. This argument centers on revolutionary advances in medical science which alter the natural process of human conception.[76] More specifically, the plaintiff-child alleging preconception injuries might argue that such Orwellion techniques as the test tube baby[77] or clon-

73. *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

74. *See* note 49 *supra.*

75. *See generally* Note, *Liability for Injuries Negligently Inflicted on Viable Unborn Child*, 63 HARV. L. REV. 173 (1949); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1962).

76. *See generally* Oakley, *Test Tube Babies: Proposals For Legal Regulation of New Methods of Human Conception and Prenatal Development*, 8 FAMILY L.Q. 385 (1974) [hereinafter cited as Oakley]; E. EDWARDS & S. STEPTOE, BIOLOGICAL ASPECTS OF EMPRYO TRANSFER, CIBA FOUNDATION, SYMPOSIUM ON LEGAL AND OTHER ASPECTS OF ARTIFICIAL INSEMINATION BY DONAR (A.I.D.) AND EMBRYO TRANSFER 16 (1972)

77. Test tube babies may be defined as the being (human or animal) which is conceived and "produced" under laboratory conditions rather than in the mother's womb. *See generally* Oakley, *supra* note 76; G. TAYLOR, THE BIOLOGICAL TIME BOMB 32 (1968); A. ROSENFELD, THE SECOND GENESIS 138-39 (1969); *Brodie, The New Biology and*

ing[78] render the unborn child capable of extrauterine existence with artificial aid *before* conception. The plaintiff injured before conception could, therefore, submit that the age of the test tube baby will artificially replace the absolute necessity of a human carrier of unborn children. The logical extension of this questionable argument is that at *all* times before birth and also prior to conception, the unborn child is capable of artificially aided extrauterine existence and is, therefore, viable and *a fortiori* owed a duty of care.

This test tube baby argument is obviously a tenuous stretching of the viability theory. Clearly judicial acceptance is conditioned on the willingness of courts to keep abreast of, and even anticipate, advances in medical science.[79] It should, nevertheless, be remembered that when the viability theory was initially attacked as extending the Holmes' rationale in *Dietrich* too far, the basis of that extension was the authority of the scientist.[80] If medical knowledge has progressed to the point at which the entire process of pre-birth "existence" may be monitored in a laboratory with no need whatsoever of a human carrier, the requisite capacity for extrauterine existence and viability exists.

As this analysis indicates, the internal reasoning of the viability theory suffers from its utilization of the constantly expanding scientific definition of viability. Medical science is not stagnant;[81] the developments and revolutionary advances in scientific knowledge have *made* extrauterine existence possible at earlier points in prebirth "existence." If the point of viability is defined pursuant to ever-increasing medical knowledge, courts adhering to the viability theory must accept those scientific advances, which arguably result in the possibility of extrauterine existence before conception.

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the Prenatal Child, 9 J. FAMILY 391 (1970); Garney, *The New Biology and the Future of Man*, 15 U.C.L.A. L. REV. 273 (1968); Note, *Criminal Law—Abortion—The "Morning-After Pill" and Other Pre-Implantion Birth Control Methods and the Law*, 46 ORE. L. REV. 211 (1967); ; Smith, *Through a Test Tube Darkly: Arificial Insemination and the Law*, 67 MICH. L. REV. 127 (1968).

78. Cloning is the aggregate of the asexually produced progeny of an individual whether natural (as the products of repeated fission of a protozoan) or otherwise (as in the propogation of a particular plant by budding or by cuttings through many vegetative generations). To oversimplify, cloning is the process by which an individual is conceived and "produced" from the cell of a living being. Test tube babies and clones are, therefore, conceived and "produced" under laboratory conditions without the aid of a human carrier. The unborn child is thus totally separable from his "mother."

79. Future advances in science are clearly not binding or persuasive on courts.

80. *See* note 24 *supra* and accompanying text.

81. ATOMS, *supra* note 7, at 3.

Similar problems will exist when the plainfiff injured before conception brings his claim in a jurisdiction aligned with the biological-separability theory.

Preconception Injuries Under the Biological-Separability Theory

In order to state a cause of action under the biological-separation theory, the plaintiff injured before conception must again resort to the test tube baby or cloning arguments. Under the biological-separability theory, after conception has occurred the unborn child is viewed as a separate legal personality owed a separate duty of care and capable of bringing an action after birth for any negligently inflicted post-conception injuries. Recognizing the prevalent role which medical science has played in the analysis of the biological-separability theory,[82] the ultimate question may be formulated; has science progressed to the point at which the unborn child before conception may be considered scientifically separable from his mother?

Upon making the tenuous assumptions that test tube babies and human cloning are within the present competence of medical science and that the judiciary is willing to keep apace with these revolutionary advances, the plaintiff injured before conception could establish the requisite biological-separability based on the ability of the scientist to intervene in life's developmental processes back to the actual point of a being's biological origin—his genetic structure.[83] Medical advances in the recent past have enabled the scientist to detect and predict metabolic disorders, genetic defects, and chromosomal aberations in the unborn child before conception.[84] Indeed, an entire new scientific field has evolved which gives expert genetic counseling to those contemplating having children. Based on these enormous medical advances which have made possible not only direct manipulation of future childrens' preconception existence, but also the increased competency of genetic counselors in predicting the health of a future child, it could be argued that the unborn child *is* biologically-separable before conception and, therefore, a legal personality to which a duty of care is owed. It is undeniably

82. *See* note 39 *supra* and accompanying text.

83. It would appear that in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied*, 370 U.S. 945 (1963), the court did in fact recognize that life can be traced to one's genetic structure.

84. *See generally* Friedman, *Legal Implications of Amniocetesis*, 123 U. PA. L. REV. 92 (1974); *Early Diagnosis of Human Genetic Defects: Scientific and Ethical Considerations*, in FOGARTY INT'L CENTER PROCEEDINGS n.6 (1971).

true that science recognizes that in the *natural* course of human development, the unborn child is separable from the moment of conception.[85] It is, nevertheless, equally true that in the era of test tube babies and cloning, the scientist is capable of *artificially* altering and manipulating this natural process of pre-birth existence and thereby *making* the unborn child separable before conception. Unlike the scientific arguments which must be advanced to establish the sufficiency of the preconception injury cause of action under the viability or biological-separability theories, a plaintiff's ability to state a cause of action under the right-to-be-born-sound theory for preconception injuries will depend largely on arguments which focus on undefined conceptualizations of "justice."

Preconception Injuries Under the Right-To-Be-Born-Sound Theory

It would appear that the preconception injury action could more easily be incorporated into the right-to-be-born-sound theory than into either the viability or biological-separability approaches. Those few jurisdictions which apply the right-to-be-born-sound theory have superficially skimmed over any duty considerations and rested their recognition of the prenatal injury action on the "future right" of the unborn child from the moment of conception to begin life as a normally functioning being.[86] Thus, this future right attaches to the unborn child at conception thereby enabling him at birth to state a cause of action for any post-conception injuries and confront the jury with his causation and negligence arguments. The ultimate difficulty with this theory is that the theory's conclusion is the extent of its analysis. These decisions justify neither why the right should exist from conception, nor why it should not exist before conception.

Strict application of this right-to-be-born-sound theory will result in dismissal of the preconception injury action; yet, this dismissal is inconsistent with the reasoning of those courts which adhere to this theory. These courts do not speak of the unborn child's legal personality; rather, focus is centered on the unquestioned right of the *living* child to begin existence as a sound being. With recovery supposedly rooted in undefined notions of "justice," the question arises whether "justice" dictates conditioning the rights of living beings on the moment at which injuries are sustained. If the basic aim of the right-to-be-born-sound theory is to enable *all* persons the equal opportunity to begin life as normal healthy beings,

85. *See* note 40 *supra* and accompanying text.
86. *See* note 52 *supra* and accompanying text.

this protection should not be refused the unborn child before conception. Where is the magic in conception that one second after, the unborn child has the right to be born sound, yet one second before, he remains totally unprotected?[87] True, there is something more after conception. Once the ovum is fertilized, the process of life has begun and absent any internal or external problems, a living being will result. Nevertheless, both the fertilized ovum and gene represent the *potential* of life.[88] Conception, like viability and birth, is therefore, a step in pre-birth existence. The question then arises why the unborn child is afforded the judicial protection of this future right during only a *portion* of existence before birth. As one author has responded:

> What does it benefit a person to know that he is protected against unjustifiable personal injuries as soon as he is born where the absence of such protection during his prenatal stages may result in his never appreciating those rights because of deformity or mental underdevelopment associated with conduct of others during the prenatal period?[89]

With "justice" dictating judicial protection of the unborn child, such barriers as conception should bow to the paramount right of unborn children in *all* stages of pre-birth existence to a sound beginning in life.

The primary difficulty with acceptance of this analysis is skepticism respecting its treatment of the significance of conception. To convince a court of the merits in this analysis, the genetically damaged plaintiff must show that life is traceable to points *before* conception and, therefore, that conception is merely a point, albeit an essential one, in a continuum. It is thus unjust to condition the right to be born sound, which *all* infants are to enjoy, on that "chunk" of pre-birth existence in which they were injured.

The probability of establishing the sufficiency of the preconception injury action under each of the three existing theories is at best minute. Under each of these theories, injuries are compensable only when sustained after a specified point in pre-birth existence. With even the more liberal theories affording protection only after the

87. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, 853, *cert. denied*, 370 U.S. 945 (1963).

88. *Id.*

89. R. MUTUNGI, THE RIGHTS OF THE UNBORN CHILD AND MINORS, 4 (Kenya, 1973).

moment of conception, the genetically damaged plaintiff will presumably need to justify submission of his action to the jury on other grounds. The following discussion explores several cases which may prove of precedential value to the preconception injury cause of action.

CASE AUTHORITY FOR THE GENETICALLY DAMAGED PLAINTIFF

Although an action for *negligently* inflicted preconception injuries has not yet been reported in the United States, there are several cases with closely analogous factual situations. *Morgan v. U.S.*[90] was the first reported case involving physical injuries caused by a defendant's negligent conduct before the plaintiff-child's conception. The *Morgan* complaint, brought in 1956 under the Federal Tort Claims Act, alleged that as the result of a negligent blood transfusion performed on the mother prior to the plaintiff's conception, the plaintiff-child born in 1955 suffered serious injuries.[91] The New Jersey District Court granted the United States' motion to dismiss holding that no action accrued to the infant who was neither a viable fetus nor even conceived at the time of the negligent transfusion.[92]

In denying the cause of action, the *Morgan* court relied on *Berlin v. J.C. Penny Co.,Inc.*,[93] which has been described as "a relic harkening back to Victorian antiquarian law and medicine which denied all remedy for prenatal injury."[94] The decision in *Morgan* stands, but not the precedent on which it relied. *Berlin* was "emphatically overruled" in 1960 by the Pennsylvania Supreme Court.[95] Futhermore, each of the cases on which *Berlin* relied were also subsequently overruled.[96]

Even had the *Morgan* court permitted this action, its decision would not be of persuasive precedential value to future preconception injury cases. *Morgan* was not, strictly speaking, a preconception injury action, rather it involved preconception negligent conduct giving rise to prenatal injuries. Although the defendant-hospital's negligent conduct occurred before the plaintiff-child's conception, she sustained no injuries from the blood transfu-

90. 143 F. Supp. 580 (D.N.J. 1965).
91. *Id.* at 581.
92. *Id.* at 584.
93. 339 Pa. 547, 16 A.2d 23 (1940).
94. 19 A.T.L.A. L. REP. 237 (Oct. 1976).
95. Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960).
96. *See* note 94 *supra.*

sion given her mother until *after* conception when the wrong type blood came into contact with the developing fetus.[97] Thus, unlike a preconception injury case where *both* negligent conduct and damage occur before the plaintiff's conception, the child in *Morgan* sustained no damage until after conception.

In dismissing the plaintiff-child's complaint, the *Morgan* court considered neither the merits nor problems in permitting the preconception injury action to reach the jury. Later that same year the concurring justice in *Hornbuckle v. Plantation Piper Line Co.*[98] presented two inherent difficulties with maintenence of the preconception injury cause of action.

In *Hornbuckle* a pregnant woman and her non-viable fetus were injured in an automobile accident as the result of defendant's negligence. The *Hornbuckle* majority rejected the requirement that the unborn child be quick at the time of injury and held, "if a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover."[99] The concurring justice, fearful of the implications of the majority's holding and concerned over the ramifications of allowing preconception injury actions cautioned:

> The rule of the majority . . . simply bypasses the inflexible rule of law that for one to maintain a suit for personal injury, the injury must be either to the person of the suit or that of a relative or one upon whom he is dependent. The indispensable requisite is completely absent here. The cell is not the person of anyone, and whether it becomes such is dependent upon the process of nature which raises it from a mere cell to a human being . . . . If a baby can sue for injuries sustained five seconds after conception, as the majority rules, why not allow such suits for injuries before conception, even unto the third and fourth generations?[100]

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97. Estep & Forgetson, *Legal Liability For Genetic Injuries From Radiation*, 24 LA. L. REV. 1, 31 (1963). *Morgan* involved preconception impact but not preconception injuries—injuries in the case of improper blood transfusions producing Rh or other blood group antibodies in the mother, unlike genetic injuries resulting from the effects of a preconception act, the injury in fact occurring after the maternal antibodies have been transferred to the developing fetus where they affect the fetal blood.

98. 212 Ga. 504, 93 S.W.2d 727 (1956).

99. *Id.* at 728.

100. *Id.* at 729.

The concurring opinion introduces two grounds for dismissing the preconception injury action: (1) compensable physical injuries may be sustained only by "persons," the definition of which, according to the concurring justice, does not include the fetal cell much less the parental gene, and (2) the possibility of "very" stale claims. Similar to both the biological-separability and viability theories, emphasis was thus placed on the point before birth at which the unborn child becomes a legal "person."

Unlike the concurring justice in *Hornbuckle*, the court in *Zepeda v. Zepeda*,[101] flatly refused to pick a point before birth at which to attach legal personality. Rather than establishing a point at which the fetal cell becames a "person" capable of tort compensation, the *Zepeda* court emphasized the unborn child's "*capacity* for independent existence."[102] In the context of three hypotheticals, it was found that the time of injury—after, at or *before* conception — was immaterial.[103] Personhood at the moment of injury was viewed as irrelevant to the child's cause of action; what was important was that

> [t]he plaintiff is a person *now* and he was a *potential person* . . . at the time of the original wrong. As he developed biologically from potentiality to reality the wrong developed too. It progressed as did he, from essence to existence. When he became a person the nature of the wrong became fixed.[104]

The *Zepeda* court, therefore, avoided such absolutes as viability and conception and critized previous attempts to distinguish the day-to-day development of life.[105] Existence before birth is a process and as such is inherently incapable of judicial divisions into protected and unprotected segments.[106]

With the benefit of the dicta provided in *Hornbuckle* and *Zepeda* outlining the problems and merits of the preconception injury action, the Tenth Circuit Court of Appeals decided *Jorgensen*

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101. 42 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied*, 379 U.S. 945 (1963).

102. *Id.* at 855.

103. *Id.* at 853-54. The *Zepeda* court emphasized "it makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them." *Id.*

104. *Id.* at 855.

105. *Id.* at 853. "How can the law distinguish the day to day development of life? . . .There cannot be absolutes in the minute to minute progress of life from sperm and ovum to cell, to embryo to foetus, to child." *Id.*

106. *Id.*

v. Meade Johnson Laboratories.[107] A Mongoloid child brought this action in strict liability, breach of warranty, and negligence for preconception injuries resulting from her mother's use of defendant's oral contraceptive product which allegedly altered the mother's chromosome structure.[108] The court vacated and remanded the district court's holding that recovery for preconception injuries lay with the legislature, not the courts.[109] *Jorgenson* was not, however, a negligently inflicted preconception injury action for the Tenth Circuit apparently recognized the child's claim on the basis of strict liability principles:

> If the view prevailed that tortious conduct occurring prior to conception is not actionable in behalf of an infant suffering personal injury from a defective food product manufactured before his conception, [he] would be without remedy . . . .
> We are persuaded that the Oklahoma courts would treat the problem here as one of causation and proximate cause, to be determined by competent medical proof. And such treatment of the problem would accord with the predominant view that an action may be maintained for prenatal injuries negligently inflicted if the injured child is born alive.[110]

Like *Zepeda*, the *Jorgensen* court placed little emphasis on the point before birth at which injuries attach. The significance of *Jorgensen* is, nevertheless, diminished in the present concern not only because it can arguably be labelled as a strict liability case, but because the complaint alleged an injury to a viable fetus.[111] Thus, in construing the pleadings most favorably to the plainfiff, the *Jorgenson* court was not compelled to limit its ruling to the damages sustained before conception.[112]

Relying on *Jorgensen*, an Illinois appellate court in *Renslow v. Mennonite Hospital*[113] permitted in 1976 what was incorrectly interpreted by some[114] to be a preconception injury action. In a factual

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107. 336 F. Supp. 961 (W.D. Okla. 1972), *vacated and remanded*, 483 F.2d 237 (10th Cir. 1973).
108. *Id.* at 238-39.
109. *Id.* at 241.
110. *Id.* at 240.
111. *Id.* at 239.
112. *Id.*
113. 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).
114. 19 A.T.L.A. L. REP. 237 (Oct. 1976).

situation quite similiar to *Morgan*, *Renslow* involved injuries to a child as the result of defendant-hospital's negligent blood transfusion given to her mother eight years before the plaintiff-child's conception.[115] The *Renslow* court, like *Zepeda* and *Jorgensen*, was not concerned with the point in time of the defendant's negligent conduct. Indeed, in the context of a short paragraph, the *Renslow* court dismissed defendant's contention that they owed the unborn child no duty of care prior to conception: "There has been no showing that the defendant's could not reasonably have foreseen that the [mother] would later marry and bear a child and that the child would be injured as a result of the improper blood transfusion."[116] Nevertheless, two aspects of *Renslow* lessen its precedential value to the action for negligently inflicted preconception injuries. First, even though interpreted to the contrary,[117] *Renslow*, like *Morgan*, involved preconception negligent conduct causing *prenatal* injuries. Although the defendant-hospital's negligent conduct occurred long before conception, the plaintiff-child in both *Renslow* and *Morgan* was not damaged until after conception when the transfused blood first came into contact with the developing fetus. And second, the *Renslow* court in allowing the cause of action correctly construed the pleadings to have alleged post-conception injuries.[118]

Later that same year, the most closely analogous case to the preconception injury action was decided in *Park v. Chessin*.[119] The parents of a congenitally deformed child brought action on the child's behalf for the alleged malpractice of medical specialists in counseling them respecting the safety in conceiving a second child.[120] The parents had previously bore a congenitally deformed child and had consulted the specialists for advice as to whether another child would suffer similar congenital ailments. The specific negligence which the complaint alleged was: "That defendants failed to take tests to ascertain the chromosomal and/or genital makeup of the mother and father so as to ascertain the possibilities and probabilities on a rational basis of any (future deformed child)."[121] The complaint sought damages for the child's "pain and suffering resulting from her birth in violation of her claimed right not to be

115. 40 Ill. App. 3d 234, 351 N.E.2d 870, 871 (1976).
116. *Id.* at 874.
117. *See* note 114 *supra*.
118. 40 Ill. App. 3d 234, 351 N.E.2d 870, 872 (1976).
119. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Super Ct. 1976), *aff'd*, 46 U.S.L.W. 2326 (Dec. 12, 1977).
120. *Id.* at 206-207.
121. *Id.*

conceived and therefore not to be born."[122] In recognizing the plaintiff-child's cause of action, the *Park* court concluded:

> Once having been born alive, particularly where, as here, the child was foreseeable and within the comtemplation of the defendants, where defendants are claimed to have been aware of or should have been aware of the danger that said child might or would be born with such defects and malady, said child assuredly comes within the "orbit of the danger" for which defendants could be held liable.[123]

The *Park* court *did* construe the pleadings as having alleged preconception injuries and its decision is clearly good law for future proconception injury actions. The decision may, nevertheless, be distinguished to the extent that the medical specialist's diagonosis did not *cause* the preconception injuries, but rather permitted the deformed child to be conceived and born.[124] Still, like *Renslow*, *Park* clearly stands for the principle that the specialists owe the unborn child a duty of reasonable care before conception.

It is apparent that these cases do not establish persuasive precedents either for or against the preconception injury action. The diametrically opposed dicta in *Zepeda* and *Hornbuckle* most succinctly presents the ultimate issue which must be resolved in future preconception negligent injury cases; that is, whether or not courts should establish inflexible rules whereby a point before birth is picked at which injuries become compensable. The central focus in the following section is whether injuries must occur to a "person" to be compensable, or whether the *potential* person can also be owed a duty of care.

THE QUEST FOR LEGAL PERSONALITY IN THE UNBORN – SHOULD IT CONTINUE?

For nearly a century, the recurrent theme in all but the most rare pre-birth injury cases has been the importance of *when* the unborn child sustains negligently inflicted injuries.[125] Under existing theories, courts have consistently attempted to divide pre-birth existence into protected and unprotected segments.[126] A few courts

122. *Id.*

123. *Id.* at 210.

124. *Park* may, therefore, be labelled a preconception tort resulting in a wrongful life suit. Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706, 712 (1977).

125. PROSSER, *supra* note 2, at 336.

126. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, 855, *cert. denied*, 379 U.S. 945 (1963).

and commentators have, nevertheless, refused to reach determinations of duty to unborn children via acquiescent applications of existing theories which confer legal personality on the unborn child only after specified points before birth.

The first American court to allow a cause of action to be stated for prenatal injuries purposely avoided "a consideration of the legal status of the fetus and (looked instead) to the causual link between the infant's condition and the defendant's wrongful conduct."[127] That Pennyslvania court in *Kline v. Zuckerman* concluded:

> The right of recovery can also be supported upon another ground, which eliminates the necessity of considering the legal status of the unborn. Liability for personal injuries is dependent in the law of negligence upon the presence of two factors: namely, first negligence on the part of the person setting a harmful force in motion, and, second, the resultant injury to an individual. The absence of either factor will defeat recovery. The time which elapses between the negligent act which puts harmful forces in motion and the receipt of the injury by the person injured *is of no consequence*, except as it may have an evidential value in a dispute as to cause and effect.[128]

Under *Kline* the point in time at which the unborn child received his injuries was a relevant, but not the sole, consideration in establishing the existence or non-existence of duty and a cause of action. Thus, more than twenty years before *Bonbrest* began the avalanche of prenatal injury recovery, *Kline* initiated the extremely important distinction between protecton of fetal rights as opposed to the interests of the live child from risks of pre-birth injuries. By avoiding considerations of *when* rights attach to the unborn child, the *Kline* court avoided resolving the inherently divergent views of the doctor, theologian, philosopher and utilitarian as to when life begins.[129]

Although *Kline* has received little or no attention, its reasoning may be resurrected in light of the Supreme Court's recent pronouncements in *Roe v. Wade*.[130] As previously discussed[131] the vast

127. Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976)(Appellant's Brief at 14).

128. 4 Pa. D. & C. 227, 231 (C.D. 1924).

129. Roe v. Wade, 410 U.S. 113, 159 (1972).

130. *Id.*

131. *See* note 66 *supra* and accompanying text.

majority of courts considering prenatal injury causes of action have struggled to determine the moment before birth at which legal personality attaches to the unborn child. *Roe* predictably has ended this search for as the Court stated:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any concensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer . . . . In short, the unborn have never been recognized . . . in the law as persons in the whole sense.[132]

It remains to be seen whether this dicta in *Roe* has ended the ninety year quest for legal personality in the unborn. The Court nevertheless clearly acknowledges the futility in searching.

Even prior to *Roe* the English Law Commission, in the context of finding that "a child who is born disabled because of some tortious injury inflicted upon its parent *before* conception *should* have a remedy,"[133] refused to search for legal personality in the unborn:

> [We] should deal with the rights of a *living* person rather than the rights of the fetus . . . . For there to be any cause of action there must be live birth. The cause of action can be said to crystallize at birth. A developing common law points towards this result . . . . [T]here is nothing repugnant to common law principles in fixing the date of injury at a point, live birth, necessarily later than both the negligent act causing the injury and the event or ocurrence resulting from that act and damaging the foetus. To look back from the fact of live birth with injury to the fault causing the injury is consistent with the common law.[134]

By "looking back" from live birth, the Law Commission suggests that the unborn be judicially protected, not merely after conception or viability, but during the entire continuum of pre-birth existence.[135] Logically, is it not, "naive for a community to grant legal

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132. Roe v. Wade, 410 U.S. 113, 156, 162 (1972).

133. ENGLISH LAW COMMISSION. *Working Paper No. 60—Injuries to Unborn Children* § 78 (1974).

134. *Id.* at §32.

135. *Id.*

protections in some stages of one's life-span and not in the entire continuum?"[136] Recognition of legal personality only during portions of pre-birth existence according to existing theories has been best criticized as follows: "How can the law distinguish the day to day development of life? . . . There cannot be absolutes in the minute to minute progess of life from sperm and ovum to cell, to embryo to foetus, to child."[137] By fixing points in pre-birth existence before which the unborn child is "free-game," the theories which have evolved in American courts most emphatically *do* distinguish portions of life's developmental process.

Upon closer scrutiny, the search under existing theories for legal personality in unborn children can also lead to irresolvable conflicts. One important inconsistency becomes apparant when the unborn child dies from his pre-birth injuries. Although the majority of courts cloak the unborn child with legal personality during part of pre-birth existence, few cases[138] can be found in which the prenatally damaged child was permitted to maintain a cause of action *before* live birth. With extremely few courts allowing a wrongful death action to be stated for the unborn child's pre-viable death, none of the existing theories can adequately or logically explain the effect on legal personality when the unborn child dies before viability from prenatal injuries. Thus, legal status has *absolutely* no significance unless the unborn child survives his *pre-birth* environment or at least attains the status of viability.[139] Certainly, the unborn child's legal status does not magically vanish when a defendant is "fortunate" enough to kill instead of maim him. Although all elements of a negligent tort are present, the cause of action disappears at previability death. A second conflict surfaces in a case in which the unborn child sustains pre-birth injury near the time of his conception. It is significant to note that conception, like viability, should be viewed more as a process over time than an event.[140] Whether injuries sustained during this process will be compensable under American theories is, therefore, patently irresolvable. A final question may be directed at the biological-separability theory.[141] Is there

136. R. MUTINGI, THE RIGHTS OF THE UNBORN CHILD AND MINORS 5 (Kenya 1974).

137. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, 855, *cert. denied*, 379 U.S. 945 (1963).

138. *See generally* 15 A.L.R.3d 922 (1967); Brantley, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140 (1976).

139. *Id.*

140. Roe v. Wade, 410 U.S. 113, 161 (1972).

141. *See* note 39 *supra* and accompanying text.

separability and *a fortiori* duty when identical twins are injured in the womb before cellular division? The twins are conceived, yet by definition they are one.[142] Certainly the fact that these twins enjoyed the first few moments of their post-conception existence "with" one another should not render them inseparable and, therefore, "fair-game" for the tortfeasor.

An even more basic inconsistency under existing theories is that preconception injury cases will be dismissed for lack of duty although such injuries are potentially foreseeable. Leading authorities in negligent tort law agree that the foreseeability test[143]

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142. *See generally* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1962).

143. A duty in negligence cases may be defined as "an obligation to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." PROSSER, *supra* note 2, at 324. Frequently duty serves as justification for a finding or refusal to find the plaintiff's interest to be protected against the defendant's injurious conduct. Because of the inherent variability of duty conceptualizations, courts are blessed with a flexible gauge that will frequently serve as a mere justification for more basic reactions: "[T]he problem of duty is as broad as the whole law of negligence, and . . . no universal test for it has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself *Id.* at 325. When one negligently starts a fire the typical court today will refuse to hold him liable for the destruction of a house miles away. *See, e.g.*, Bird v. St. Paul Fire & Marine Co., 224 N.Y. 47, 120 N.E. 86 (1918); O'Neill v. New York, O. & W. R. Co., 115 N.Y. 579, 22 N.E. 217 (1889). The conclusion will be stated in terms of duty. Underlying that determination are the myriad of variable factors which actually explain the refusal to permit the jury to consider liability.

Since 1928 the typical decision in which duty analysis is warranted will be phrased in terms of foreseeability. In that year Justice Cardozo wrote Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), in which he held:

> Negligence was a matter of relation between the parties, which must be founded upon the foreseeability of harm to the person in fact injured. The defendant's conduct was not a wrong toward [the plaintiff] merely because it was negligence toward someone else. [Plaintiff] must sue in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

Id. at 100. Since *Palsgraf* many courts have phrased their answer as to whether the plaintiff's interests are entitled to judicial protection from the defendant's conduct, in terms of foreseeability. *See, e.g.*, Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Curry v. Journal Pub. Co., 41 N.M. 318, 68 P.2d 168 (1937); Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S.E.2d 420 (1944); Resavage v. Davies, 199 Md. 470, 86 A.2d 879 (1952). Recognizing the difficulty in adequately interpreting Cardozo's foreseeability test, one author has attempted to explain *Palsgraf* as follows:

> Perhaps it is attempting to reduce the irreducible, but it seems fair to say . . .that there are just two basic questions: (1) is the wrongdoing defendant liable only for those kinds of injury which would be reasonably foreseeable; and (2) is the defendant liable only to those plaintiffs injured

contains no requirement that at the time of the defendant's tortious conduct, the plaintiff be in existence.[144] Some authorities have noted that, "the limitation of the *Palsgraf* case contains no requirment that the interests within the range of peril be known or identified in the actor's mind, *or even be in existence at the time of the negligence.*"[145] Others have emphasized that plaintiffs should recover for personal injuries although at the time of another's negligent conduct, "these may be unknown or *unknowable* persons."[146] These authorities have, therefore, suggested that a duty of care can be owed to one who does not "exist." This is precisely the case in a preconception injury action. The obvious implication is that the preconceived child *could* be foreseeably endangered by one's negligent conduct. Indeed, even more provocative is the argument that it is *more* foreseeable that a child will be born of the woman in the orbit of the danger than that this woman is in fact already pregnant. The unborn child's "non-existence" before conception arguably should not, therefore, render him unforeseeable and unprotected.

Renslow[147] and *Park*[148] have substantiated the views of these legal commentators that one may owe a duty of care to the unborn before conception. Notably, the defendants in both of these cases were doctors or medical experts and, therefore, would have been held to a specialist's standard of care.[149] Duty was nevertheless

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by his wrongdoing who he reasonably could have foreseen might be injured.

ATOMS, *supra* note 8, at 92.

The dissenting justice in *Palsgraf* took a much less restrictive view of the scope of duty. Justice Andrews posited that each owes a duty of reasonable conduct to all and concluded, "not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone." Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99, 106 (1928) (Andrews, J., dissenting).

The cases to which *Palsgraf* is appropriate precedent seem to have accepted Cardozo's theory over Andrews'. It is questionable whether the preconception injury action is governed by *Palsgraf* as the foreseeability with which Cardozo was apparently addressing was in respect to physical distances and not time elements. Assuming *arguendo* that *Palsgraf* does contain precedential value, the plaintiff in the preconception injury action will need to establish that at the time of the defendant's tortious conduct it was foreseeable that a future person would sustain genetic damage.

144. HARPER & JAMES, 2 *Law of Torts* § 18.3 (1956).

145. *Id.*

146. Seavey, Book Review, 45 HARV. L. REV. 209, 210 (1971).

147. Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976). *See* note 113 *supra* and accompanying text.

148. Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Super Ct. 1976), *aff'd*, 46 U.S.L.W. 2396 (Dec. 12, 1977). *See* note 119 *supra* and accompanying text.

149. PROSSER, *supra* note 2, at § 32.

found and the respective defendants were held responsible for acts done long before the future plaintiff-child's conception.[150]

In conclusion, it would appear that the search for legal personality in the unborn should end. To the extent that theories which confer legal status on the unborn for mere portions of pre-birth existence are subject to attack as unnecessary, illogical, and inconsistant, they should be reappraised. As one author states:

> If the science of genetics develops to the point where causation can be proved, logic would seem to call for recovery for preconception injuries on the same grounds suggested for post-conception injuries in radiation cases. *The concept of a separate legal entity should not be an obstacle if compensation is accepted as the theory for tort recovery.* So long as the defendant is protected against unreasonable claims by placing a substantial burden of proof upon the plaintiff there is no reason to immunize the wrongdoing defendant from liability for actual injuries which result from his negligence.[151]

CONCLUSION

For almost a century American courts have determined the existence of duty to unborn children via three theories which divide "life" before birth into protected and unprotected segments.[152] Depending on the particular theory which a jurisdiction follows, the unborn child will be owed a duty of care only after the moment of viability or conception. These points in time before birth were chosen historically on the basis of the unborn child's separability from his mother.[153] Thus, only when shown to be separable will the unborn child be judicially protected from negligent conduct with the cloak of legal personality and be owed a duty of care.

Faced with such inflexible "point-picking" theories, the genetically damaged plaintiff has little hope of establishing duty and the sufficiency of his cause of action. If he is to reach the jury with his causation and negligence arguments, the plaintiff-child alleging preconception injuries must resort to such revolutionary

150. In *Renslow* the court found that the defendant-hospital breached a duty owed the plaintiff-child eight years before his conception. In *Park* the court found that the defendant-doctor breached a duty owed the plaintiff-child several months before her conception.

151. ATOMS, *supra* note 7, at 232-233.

152. *See* note 66 *supra* and accompanying text.

153. *See* note 24 *supra* and accompanying text.

developments as cloning or test tube babies in order to show his requisite separability.[154] The chance for judicial acceptance of such tenuous arguments is at best minute.

Likewise, the small amount of legal precedent respecting preconception injuries presents only minor assistance to the genetically damaged plaintiff's cause of action.[155] Indeed, with the first true negligently inflicted preconception injury case yet to arise, the only indication of how courts will respond to this unique action is found in dicta.

Nevertheless blanket dismissal of all preconception injury cases does not seem well founded. Judicial treatment of the prebirth injury tort is subject to several basic criticisms.[156] In attempting to grant legal personality to the unborn under existing theories only after specified points in time before birth, courts are forced to "distinguish the day-to-day development of life"[157] and resolve the irresoluble question of when life begins.[158] With their inconsistencies apparent on closer scrutiny, existing theories are also subject to attack as illogical. Courts accepting present theories have, for example, cornered themselves into dismissing all preconception injury cases even though such injuries may be clearly foreseeable.

Roe[159] has, hopefully, ended the ninety year search for legal personality in the unborn. Indeed, logic would seem to dictate that courts discontinue the futile rhetoric respecting fetal rights and direct judicial energy toward the protection of *living* children from risks of injury before birth. Only then will determinations of duty be made on a case-by-case analysis rather than under inflexible theories which prevent a court from considering the merits of individual preconception injury cases and thereby preclude the genetically damaged plaintiff from establishing the sufficiency of his cause of action. In short, historical rules which absolutely preclude maintenance of potentially meritorious claims warrant re-evaluation.

This re-evalutation of existing theories is of immediate importance:

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154. *See* note 73 *supra* and accompanying text.

155. *See* note 90 *supra* and accompanying text.

156. *See* note 125 *supra* and accompanying text.

157. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, 855, *cert. denied*, 379 U.S. 945 (1963).

158. Roe v. Wade, 410 U.S. 113, 159 (1972).

159. *Id.*.

> **The 20th century legal profession [must move] quickly to guide the adjustment of the law [and] be prepared to modify existing rules and to assist in the formulating of new doctrines to meet the unique problems which are certain to arise.[160]**

It remains to be seen how our judicial system will respond to the preconceived injury tort and whether a duty to unborn, unconceived children will be found. Hopefully the creative continuity[161] which characterized judicial treatment of prenatal injuries in recognizing a duty at points closer and closer to the moment of conception, will continue beyond.

160. ATOMS, *supra* note 7, at 3.

161. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).